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APR 28 1997

Federal Communications Commission
Office of Secretary

April 25, 1997

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

Re: DBS Public Service Obligations, MM Docket No. 93-25

Dear Mr. Caton:

The Satellite Broadcasting and Communications Association (SBCA) respectfully submits the attached comments for consideration in the above-captioned proceeding. Please find enclosed an original and fifteen copies pursuant to the Commission's rules to be distributed to the appropriate parties.

Sincerely,

Andrew R. Paul
Senior Vice President

ARP/mh
Enclosures



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APR 28 1997

Federal Communications Commission
Office of Secretary

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of

Implementation of Section 25
of the Cable Television Consumer
Protection and Competition Act
of 1992

Direct Broadcast Satellite
Public Service Obligations

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MM Docket 93-25

**FURTHER COMMENTS OF THE SATELLITE BROADCASTING
AND COMMUNICATIONS ASSOCIATION OF AMERICA**

Andrew R. Paul
Senior Vice President
Satellite Broadcasting &
Communications Association
225 Reinekers Lane
Suite 600
Alexandria, VA 22314

April 25, 1997

The SBCA is the national trade association of the Direct-To-Home satellite industry. It is a vertically integrated organization in that it represents all the components of the DTH industry, including satellite manufacturers and operators, the DBS providers, the subscription program services which are carried on DBS or marketed to C-Band consumers through third party packagers, DTH receiving equipment manufacturers and distributors, the satellite carriers which retransmit broadcast programming and the more than 2,500 retail dealers which are the consumer point of sale for both DTH receiving equipment and programming.

The Commission has asked interested parties to file additional comments to refresh the record in this proceeding, initiated almost four years ago. Since that time, the DBS operating environment has changed significantly. There are now five active DBS providers offering private subscription satellite services to the public, with another provider expected to launch operations within the next twelve months.¹ Thus, the industry now has the opportunity to examine the public service mandate of Section 25 in the context of "real life" experience of DBS providers.

These comments are intended to assist the Commission in applying Section 25 in the most realistic and meaningful manner possible to DBS services. As the Commission knows, DBS has grown rapidly since its inception in 1994² and is providing increasing competition to the cable industry. Nonetheless, the current DBS subscriber count of approximately 4.6 million homes represents less than 5 percent penetration of all TV households, compared to 63 percent for cable. So DBS, while beginning to make its mark in the video marketplace, is still nascent in its development.

The DBS providers comprise a major segment of the SBCA and constitute the fastest growing component of the satellite industry. These are the companies which have been pioneering the development of DBS service and to whom the public service rules which issue from this proceeding will apply. These comments will provide the industry backdrop for the implementation of the Commission's public service rules, much as SBCA's comments in May, 1993, did.

¹Askys and EchoStar are not party to SBCA's comments.

²PrimeStar has actually been in operation since 1992, but at a relatively small scale. 1994 is an appropriate time to mark the inception of the DBS industry as we know it today.

II. The Commission Should Create A Flexible Approach To Public Service Obligations In Order To Create A Unique And Meaningful Public Service Model.

The creation and implementation of public service formats adaptable to DBS providers will require a bold new model, different from those presently employed by broadcasters and cable operators. The greatest singular difference is the national character of DBS satellite service as contrasted with the local and community orientation of broadcasters and cable companies. The latter are directed to local audiences by virtue of their presence within the licensed/franchised service areas and their distribution technologies.

DBS, on the other hand, has no truly local presence. This results in a new and different context in which these video providers are to provide public service programming than the traditionally local model which has been the primary one until now. The programming which is to be offered by DBS must be of national interest and quality, and sufficiently so as to attract large numbers of viewers and not waste the capability and coverage of typical DBS satellite resources. In other words, the public service programming of interest to local audiences most likely would not be appealing to a national viewing base.

In order to fulfill its national potential, therefore, each DBS provider should have the ability to tailor its public service program offerings to be attractive to the audience that has selected its service, and also to utilize those offerings as a tool to differentiate itself from not only its land-based competition but also from its DBS competitors. The SBCA believe its

proposals can assist the Commission in developing guidelines for DBS public service requirements because they recognize the unique characteristics of DBS and relate them to a practical public service solution.

A. The Industry Will Dedicate 4% Of Its Channel Capacity Exclusively To Public Service Programming.

SBCA proposes that 4% of channel capacity, as defined below, be dedicated to public service programming and that the Commission provide that 4% is the maximum imposed on DBS operators to fulfill the public service obligation. The 4% channel requirement would be applicable upon the effective date of the obligation period,³ as set forth in Section IV, Part D.

Initially, we express some of our concerns. First, Section 25 both sets the amount of channel capacity which is to be reserved for public service activity and directs that there be subsidized rates for some defined eligible programmers. No such requirement is imposed on broadcasters. Nor are such rate obligations imposed on cable companies. Section 25, in effect, appropriates DBS channel capacity and mandates a 50% cost subsidy for certain types of public service programmers – a unique and burdensome precedent for determining channel usage by any video distribution service.

Second, selecting sufficient public service programming of national interest to fill 4% of channel capacity may not be a simple matter. The programming must meet the criteria established for “public service,” and apart from existing programmers and start-ups created exclusively for the DBS market, some operators may also elect to create their own public

³For small DBS operators, i.e., those with fewer than 50 channels, the 4% should be calculated against all operational capacities as applied separately at all orbital locations (East or West) rather than at a single, specific location.

service offerings. Accordingly, we submit that 4% of channel capacity should suffice, particularly for a nascent industry, not only in view of the national format to which the obligation will be applied, but also because of the potentially limited amount of programming which will be available to attract a national viewing audience.

B. A Non-Profit Industry Organization Could Act As The Clearinghouse For Selecting Eligible Programming.

A viable method for establishing a focal point for DBS public service programming would be the establishment of a 501(c)(3) non-profit organization which would act as a clearinghouse to administer and coordinate a pool of public service programming which would be available to DBS operators. The organization would have several functions:

- Set standards and criteria for educational or instructional program eligibility for all interested programmer applicants;
- Screen public service and educational programmer applicants who seek DBS carriage under the FCC's rules;
- Consider new approaches to the creation of eligible programming;
- Select or endorse programming meeting the criteria; and
- Provide a forum for communication between the DBS industry and representatives of the public service and educational community.

The governing group would be composed of 50% DBS industry representatives. The DBS companies would also invite participation by representatives of the public service and educational communities who would comprise the remaining 50% of the body. DBS companies would have the ability but not the obligation to select some or all of their public service programming from those program services certified by the 501(c)(3). The organization's purpose would be to develop objective selection criteria for educational and instructional program eligibility. Its efforts would be directed at fostering the highest quality

public service programming which would appeal to national viewing audiences that constitute the DBS subscriber base.

The organization would also have some practical aspects to its operation. First, it would serve as a clearinghouse for programmers who believe they qualify for DBS carriage. Second, it would provide an independent body to choose from the anticipated large number of programmer applicants, some of whom may not qualify under the Commission's definitions or the screening criteria established by the 501(c)(3) body. Third, the composition of the screening body would be evenly divided between industry representatives and public service and education groups. In the event a DBS operator elects not to participate in the 501(c)(3) process, the Commission could choose to establish, as an alternative, programming and operating criteria which would apply to them. The Commission would review programming determinations by the DBS providers in the event of an abuse of discretion. In any event, it should be evident that the success of the 501(c)(3) will depend on financial contributions by all DBS providers operating in the market place. While some may elect not to carry 501(c)(3)-selected programming, the functioning of the body will depend on the support of all DBS companies.

C. Fulfilling The Public Service Commitment.

Commission policy concerning fulfillment of the public service obligation should encourage each DBS service provider to offer a unique and innovative response. A flexible approach is required in view of the multiple formats and potential program choices which may be available to each operator, as well as the size and subscriber penetration of the particular service. Smaller DBS operators could be especially vulnerable in this respect so the Commission must ensure that its rules are not so limiting that these providers become

incapable of developing a public service format unique to their circumstances⁴. Varied offerings, given the proper amount of flexibility within the rules adopted by the Commission, could also stimulate differentiation between DBS providers, as well as with cable competitors. Some DBS operators may even develop proprietary program formats to make their program packages totally unique and more appealing as they compete for subscribers.

Programming can also vary. For example, an industry-wide programming effort coordinated among all DBS providers could serve as a viable competitive tool. Participating in the non-profit DBS public service program selection body previously described would likely be acceptable to some providers, but the programming chosen from the qualified pool may only be part of a total public service package. Selection of pool programming would not be mandatory but rather would be one option available to providers. Each provider should make its own judgment on the programming mix which will best serve its subscriber base. Thus, for example, a public service offering could comprise pool programming, as well as unique provider-originated programming, or educational applications, which would take advantage of the point-to-multipoint capability of satellite broadcasting. In the case of provider-originated programming, it should strive to meet the criteria for acceptable programming used by the non-profit screening body.

Thus, an appropriate mix of public service programs would be made available by each provider deciding, on the basis of its own market research and business planning, the combination of offerings that would best satisfy its viewers. This approach yields the element of timeliness and responsiveness, in that DBS operators will respond to perceived

⁴ Smaller DBS systems may require additional flexibility in meeting their public service requirements, such as providing personal computer Internet-like access for education.

viewer needs with public service programming of appeal; it provides an incentive to DBS operators to develop innovative public service programming; and, as we have stated, it allows for program exclusivity and the concomitant benefits of system differentiation and program diversity.

III. Definition of "Non-Commercial Programmer"

The term "non-commercial" programmer elicits different meanings and definitions depending on the context in which it is used. Does "non-commercial" clearly and distinctly mean not-for-profit? Can it be subscription programming? Can it be underwritten by for-profit entities? These, and other questions, will have to be answered by the Commission in this proceeding because they bear significantly on the classes of programming, either presently available in the market or to be developed in the future, which may or may not be eligible for public service certification.

Further, we submit that the Public Broadcast Service and C-SPAN and C-SPAN2 channels qualify for the public service obligation, and the Commission should ratify their status in this proceeding. SBCA suggests, however, that these three services should not comprise more than 50% of a DBS operator's public service offering on order to encourage the development of more unique and proprietary programming by DBS providers which we discussed earlier.

Public service programming is also likely to be available through subscription or underwritten by third parties, provided it meets the criteria for public service developed by the non-profit DBS public service organization or other generally established criteria. This could include programming which carries commercial advertising related to its purposes and furthers the public service goals its espouses. In addition, other programming formats

provided as the result of negotiated agreements with the service providers, such as subscription agreements, special carriage conditions and marketing or joint participation arrangements, should be acceptable.

The same principle should apply to provider-originated programming. The proposed programming of this nature should be determined by the program originator to be qualified for certification by the 501(c)(3) body although it may not be submitted for scrutiny. If the provider chooses to submit the programming to the screening body, the programming would not become part of the pool programming but would rather receive a seal of approval as to its verity as a public service program. Acquiring this recognition would appear to be a sufficient benefit to encourage providers to submit original programming for processing by the screening body.

IV. Definition of "Channel" and Calculating Channel Capacity.

The definition of satellite capacity to determine the 4% should be based on "video channels offered to the public." This is realistic because it is only these channels to which consumers subscribe and view consistently. The exact number to be utilized to meet the obligation would be determined by each DBS operator on an annual basis on a date certain to be uniformly applied to all DBS providers.

A. Determining the Channel Basis.

It is important, however, that certain types of channels not be included within the basis for determining the 4% because they are not true "video channels offered to the public." Such channels include:

- System channels which contain instructions or are necessary for operation, installation or administration of the service.

- Barker channels which contain transient information for viewers.
- Channels containing static video, e.g., some audio channels.
- Audio-only channels.
- Channel guides.
- Data or business-only channels.
- Duplicative video channels provided for consumer convenience.

These channels are either utilized by the DBS provider or available for the convenience of the subscriber to facilitate system administration, messaging or providing program scheduling, navigation or announcements. While these “screens” are part of the DBS provider’s service, they are not “channels” which should be counted in the basis. Audio-only channels likewise should not be counted. Further, it would not be useful to speculate presently on any future types of program or system channels which may come into being since these new situations can be addressed by the providers as they measure “video channels offered to the public.”

B. Calculating Public Service Channel Carriage.

When SBCA filed its initial comments in this proceeding in May, 1993, there was only one DBS provider in operation on a modest scale. At that time, we did not have available information relative to the scale and capacity of the DBS systems which subsequently came on line. Today, five systems offer private subscription services to consumers, and the industry now has more complete information and on-line experience

with the use of compression in this marketplace. This enables a more realistic computation of the anticipated numbers of channels out of the total number of channels that are available that should be used to meet the public service obligations.

With that in mind, SBCA recommends the following "step" system for applying the 4% requirement against the total eligible channel basis. Based on the annual calculation which we have previously proposed herein, the channel capacity requirement for public service is to be determined for the particular year and remain fixed until the next annual calculation. No partial channels are to be counted.

Scale of Capacity of Commitment

(4% of 175 Channels = 7)

<u># of Channels</u>	<u>#Public Service</u>
175+	7
150-174	6
125-149	5
100-124	4
50-99	3
25-49	2*
<25	1

*at 75% capacity

For systems with less than 50 channels of capacity, we have assigned a maximum of two public service channels. The second channel would become operational only when the base channel capacity has reached 44 channels. The first channel is allocated for the <25 tier, and the second is implemented when base channel capacity has reached 75% of the channels in the 25-49 tier, i.e. at channel 44. This procedure allows smaller DBS systems to fulfill their public service obligation at the same 4% ratio as the others, while allowing them to avoid any possible market disruption before bringing on the second channel. This is a reasonable accommodation.

Channel Carriage Factors

There remains for determination the configuration of the appropriate channel capacity for public service carriage. SBCA urges the Commission to allow for as much flexibility as possible among the DBS providers so that each is able to adapt the obligation to the program format and packaging of their respective systems.

Each provider should be able to select one of two options: (1) discrete channel allocations whereby specific channels would be designated in their entirety for public service programming; or (2) meeting the obligation on a time/hour equivalency basis and spreading the programming over a number of channels and in different time slots. The latter option is especially important in distant learning environments where classroom hours must be flexible. In either case, however, the decision should be left to the provider who can best determine the operational characteristics of the specific system.

B. Phase-In of the Obligation.

SBCA urges the Commission to provide a phase-in of two years before requiring the full public service obligation to be implemented by DBS operators. This period of time is necessary to establish a programming service which will truly serve the public. There are several factors at play which must be addressed before public service programming can adequately be presented:

(1) The industry must agree to organize and set in motion the non-profit 501(c)(3) organization discussed previously in these comments. The DBS companies must agree on the terms and conditions of participation, funding, public service participants, establish the appropriate criteria for program certification and commence the process of screening and selecting program services;

(2) Program contracts must be renegotiated where necessary and new contracts must be negotiated with existing and prospective public service programmers; and

(3) The necessary channel configurations must be put in place by the DBS providers with subscribers notified of the program availability and scheduling.

All of the foregoing requires a reasonable amount of time to be put into place. Two years appears to be a reasonable transition period.

V. Components of Direct Costs.

In our earlier filing, we commented extensively on the matter of how costs should be applied in the DBS public service model. It is a complex issue, and the Commission must consider it carefully. As we initially stated, starting a DBS business is a very costly enterprise. Satellites must be built, insured and launched; compression and encryption techniques established, and consumer reception equipment designed; a DBS subscriber authorization center built; uplink sites constructed, and a retail distribution and marketing network organized. The fees charged for subscription service must pay for the capital and operating expenditures of the system while at the same time remain competitive with cable, as well as other multichannel video providers in the marketplace.

Each DBS operator has a different cost structure and system configuration, technology, marketing, operating and administrative factors of which all play an important role in how costs are allocated within each system. The Commission should afford DBS providers as much flexibility as possible in determining and weighing the costs applicable to each operator's business. This, in turn, will permit each provider to fix the appropriate rates for public service programming, depending on the type of programmer, the financial and advertising base of the particular program service, and whether or not it is subscription-based.

Section 25 makes clear that the only services eligible for the specified 50% rate are "national educational program suppliers." This leaves a broad range of other types of public service programmers with whom DBS providers may negotiate in order to determine the conditions and rates of carriage. SBCA believes additionally that mutually agreed upon arrangements between DBS operators and eligible "national educational program

suppliers” regarding marketing, carriage and rates will be important and prove to be highly beneficial to both parties, even though such agreements may not fit precisely within the established conditions for service. Finally, SBCA also urges the Commission to grandfather all existing contracts with programmers who qualify for the public service obligation once the Commission has issued its rules. It is only fair that previously negotiated contracts be honored, as has been the case in other proceedings dealing with the marketplace.

As SBCA stated in its earlier comments with regard to the calculation of total direct costs toward which the 50% is attributable, all platform provider capital costs should be included. The statute specifically excludes marketing costs, general and administrative expenses, and “similar overhead costs.” SBCA also urges the Commission to allow research and development costs to be included in view of their necessity and importance in launching such a complex business as a DBS service.

We raise here again, as we did in our 1993 filing, the question of editorial control by DBS providers implementing Section 25. We fully agree with the Commission's earlier conclusion that DBS providers should not have any liability for any political or non-commercial programming not under its control which is carried as part of the Section 25 requirement.

VI. Political Requirements.

Prior to the enactment of Section 25, the “reasonable access” requirements of Section 312(a)(7) of the Communications Act applied only to single channel, advertiser-

supported, locally-licensed terrestrial broadcasters.⁵ In that context, the Commission has interpreted reasonable access to require access for all legally qualified candidates for federal office and to require broadcasters to provide such access in the same increments in which the station sells time to commercial advertisers or programs the station itself.

The Commission must now grapple with how to apply “reasonable access” requirements to a private, multichannel, national subscription service, taking the following differentiating features into account: (1) DBS is a national, not a locally based service. Should DBS operators be required to provide “reasonable access” for statewide (i.e., Senate and House) as opposed to only national federal candidates despite the inefficient use of spectrum resources that would entail? (2) DBS providers, like cable operators, license program services.

Copyright law in general and program license agreements in particular forbid DBS operators from making any deletions or alterations to the programming supplied by others. Thus the only channels on which DBS operators have any meaningful control and could potentially make time available to candidates without violating copyright law and/or programming contracts, are the program guide and “barker” channels, pay-per-view channels, and the channels used to satisfy the public service obligation.

The difference between DBS and both broadcast and cable outlets must also be taken into account in applying the “equal opportunities” requirements of Section 315. Those requirements may not lend themselves to a national subscription service. The Commission must consider these factors as it develops the rules governing the provision of this type of programming.

⁵ “Reasonable access” requirements do not apply to cable or other multichannel subscription services.

We comment on a few of these issues.

In 1993, we emphasized the inefficiency of utilizing a national distribution service such as DBS for political broadcasting involving local candidates. Because DBS is a national service, "reasonable access" requirements should be limited to federal candidates for national office, namely for President and Vice President. U.S. Satellite Broadcasting, a DBS member of SBCA, provided free time, for example, to Presidential candidates during the 1996 election. To require access to local candidates, however, would waste valuable transponder and spectrum resources by placing material of a purely local or statewide interest before national audiences. That would not constitute a judicious use of satellite broadcasting in the context envisioned by either the Commission or the DBS providers from the inception of the service. In addition, to the extent that broadcast stations are carried on DBS, the political programming carried by those stations should help provide local candidates with exposure and so should help meet the DBS providers' "reasonable access" requirements.

DBS operators, like broadcasters, should have the discretion to determine what is "reasonable access," and the Commission should intercede only when there has been an apparent abuse of that discretion. Furthermore, the DBS obligation to provide reasonable access should be limited to channels on which the DBS operator sells advertising time, controls blocks of programming time, or can be deployed on those channels or in the time blocks reserved for public access.

SBCA urges that, in applying the "equal opportunities" concept to the DBS environment, operators not be required to air opposing candidates on the same channel or take audience demographics into account. They only must provide "equal opportunities" on a channel with comparable audience size.

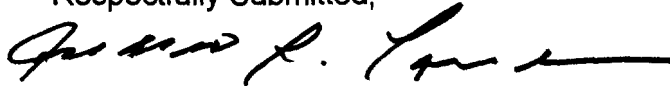
Finally, the lowest unit charge rules and interpretations which apply to off-air broadcasters should apply equally to DBS, to the extent that DBS sells advertising now or in the future.

VII. Conclusion.

The Commission has appropriately solicited all interested parties to refresh the record in this important proceeding. Because designating a finite amount of private channel capacity for public service is a landmark action, we urge the Commission to be extremely judicious in its consideration and establishment of its rules. The DBS industry, as we have discussed, is a national, private subscription service with different characteristics than its local video distribution competitors. Therefore, the public service format and programming which results from this proceeding must satisfy a national base of subscribers. Determining the criteria for eligible programming will be complex under these circumstances, thus we urge the Commission to afford DBS providers as much flexibility as possible in order to: 1) satisfy a broad subscriber base, 2) differentiate themselves both from one another and from their cable competitors, and 3) create an environment which encourages both industry-wide approaches to satisfying the public service obligation, as well as developing provider-originated programming. The SBCA looks forward to working

with the Commission to produce a unique and meaningful public service segment for DBS providers which will offer consumers useful and educational programming in accordance with the intent of Section 25.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Andrew R. Paul", with a long horizontal flourish extending to the right.

Andrew R. Paul
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Dated: April 25, 1997